IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 586 of 1999
and
SPECIAL CIVIL APPLICATION NO.4065 OF 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURENDRANAGAR DUDHREJ NAGAR PALIKA

Versus

STATE OF GUJARAT

Appearance:
MR PM THAKKAR and MR NAVIN K PAHWA for Petitioners
MR PG DESAI ld.GOVERNMENT PLEADER for Respondent No.1, 2 and 3 in Spl.C.A.No.586 of 1999 and MR. MUKESH PATEL, ld.Asstt. Govt. Pleader for respondents nos.1, 2 and 3 in Spl.C.A. No.4065 of 1999.

CORAM : MR.JUSTICE M.R.CALLA
Date of decision: 27/08/1999

COMMON ORAL JUDGEMENT

Both these petitions relate to the dissolution of Surendranagar Dudhrej Nagar Palika, under Sec.263 of the Gujarat Municipalities Act. Special Civil Application

No.586 of 1999 was filed before this Court on 25th January 1999 when the notice dated 12th January 1999 was issued by the Government in exercise of the powers under Sec.263(1) of the Gujarat Municipalities Act, 1963. In this Special Civil Application, the notice was issued on 27th January 1999 by this Court as to why the Special Civil Application should not be admitted, heard and finally disposed of at the admission stage. This order is treated as good as Rule. Whereas caveat has been entered by Mr.P.G.Desai, learned Govt. Pleader on behalf of the respondents nos.1 to 3, i.e. State of Gujarat, Director of Municipalities and Collector, Surendranagar, it was ordered that the notices need not be issued to these three respondents. On 6th April 1999, the matter was made to stand over to 19th April 1999 and again on 19th April 1999, it was made to stand over to 28th April 1999. On 28th April 1999, again the learned Govt. Pleader wanted time to file counter affidavit and for that purpose, the matter was posted to 24th June 1999. In the meanwhile and during the pendency of this Special Civil Application No.586 of 1999 challenging the apprehended dissolution of the Municipality on the basis of the show cause notice dated 12th January 1999, which was under challenge, the Government passed an order on 25th May 1999 whereby the Surendranagar Dudhrej Nagar Palika was dissolved and the Prant Officer of Surendranagar was appointed as its Administrator. In view of this order dated 25th May 1999 passed by the Government, this Special Civil Application No.586 of 1999 against the show cause notice dated 12th January 1999 virtually became infructuous.

2. Now, the petitioners who are 28 in number in Special Civil Application No.4065 of 1999 claiming to be the elected Councillors of the Surendranagar Dudhrej Nagar Palika have preferred this Special Civil Application No.4065 of 1999 challenging the order dated 25th May 1999 on 14th June 1999. This Special Civil Application No.4056 of 1999 came up before this Court on 21.6.1999 on which date the caveat was entered on behalf of the respondents nos.1, 2 and 3 by the learned Asstt. Govt. Pleader Mr.Mukesh Patel and on his request, time was granted more than once. When the matter again came up before the Court on 7th July 1999, learned Counsel for the petitioners sought permission to delete the names of respondents nos.4 and 5 and accordingly their names were deleted. On this date, i.e. 7th July 1999, the Rule was issued to the remaining respondents and Mr.Patel, learned Asstt.Govt. Pleader waived the service of Rule and as it would appear from the contents of this order dated 7th July 1999 and for the reasons stated therein, the matter

was directed to be listed on 13th July 1999 for final hearing along with Special Civil Application No.586 of 1999. The arguments in both these petitions were finally heard on 23rd July 1999 as would appear from the order sheet recorded on 23rd July 1999 in Special Civil Application No.586 of 1999 and the matter was posted for dictation of the orders.

3. Now so far as Special Civil Application No.586 of 1999 is concerned, it has virtually become infructuous as stated above in view of the order dated 25th May 1999 and therefore, the same deserves to be dismissed as having become infructuous. So far as Special Civil Application No.4065 of 1999 is concerned, an affidavit-in-reply dated 2nd July 1999 on behalf of the respondent no.1 has been filed through Shri J.M.Vyas, Deputy Secretary, to the Govt. in the Urban Development and Urban Housing Department.

4. Learned Counsel for the petitioners made a pointed reference to para 2(v) that the Director of Municipalities had issued a letter dated 29th December 1998 to the Collector requiring him to explain as to how the points made out and the allegations raised for the dissolution of the Muncipality could be justified and while the Collector had not sent any reply to the letter of the Director and the inquiry as made by the office of the Director was pending, the respondent no.1 initiated the action for dissolution.

5. There is no dispute about the factual position that the impugned order dated 25th May 1999 was passed during the pendency of the Special Civil Application No.586 of 1999, i.e. the Special Civil Application directed against the show cause notice dated 12th January 1999 in the matter of dissolution of the Municipality in exercise of the powers under Sec.263; in the said Special Civil Application the respondents nos.1 to 3 had already entered appearance and were to answer the notice issued by this Court as to why this petition should not be admitted, heard and finally disposed of at that stage and yet after taking time more than once, and lastly on 28th April 1999 when the matter was made to stand over to 24th June 1999 as the learned Govt.Pleader sought time to file counter affidavit, the impugned order dated 25th May 1999 was passed. On these undisputed facts it has been submitted on behalf of the petitioners while arguing the Special Civil Application No.4065 of 1999 that the respondents have successfully tried to overreach the process of Court. While the Court was already seized of the question as to whether the Municipality was liable to

be dissolved on the basis of the show cause notice dated 12th January 1999 or not and the notice as to why this petition should not be heard and finally disposed of at the admission stage was to be answered and the time was taken for filing the reply and yet before the next date i.e. 24th June 1999, the respondents instead of filing any reply in Special Civil Application No.586 of 1999 chose to pass the impugned order on 25th May 1999 and therefore, they have tried to overreach the process of the Court. The learned Govt. Pleader has submitted that there was no stay order against the Government and therefore, it could have passed the order dated 25th May 1999 even though the Special Civil Application No.586 of 1999 was pending and even if the Government had sought time to file the reply on 28th April 1999 the matter was posted for 24th June 1999 on the request of the learned Govt. Pleader, it cannot be said, in absence of any interim order against the respondents, that they have overreached the process of the Court. Technically, learned Govt. Pleader may argue that there was no interim order and therefore, the impugned order dated 25th May 1999 could be passed, but the undisputed facts as above make it very clear that the impugned order dated 25th May 1999 was passed when this Court was already seized of this controversy and the question as to whether the Municipality was liable to be dissolved or not was under the judicial review. In the opinion of this Court, this is a clear and illustrious case of overreaching the process of the Court. When the State action is challenged through petitions under Article 226 before the Court on the question of threatened or apprehended injury and the Court does not feel inclined to pass an ex parte ad-interim order so as to afford an opportunity to the other side to answer the case on which the action is sought to be taken, the State and its functionaries which are not simple adversary litigants and are rather virtuous litigants, cannot take upon themselves to pass final rders so as to render the action for judicial review initiated by the petitioners to be infructuous. On the one hand, time is sought for filing the reply and on the other hand, instead of filing the reply, the final orders are passed. In such a case of motion against the threatened injury, the whole purpose of moving the petition for the threatened and apprehended injury is lost and it gives rise to the multiplicity of proceedings and therefore in such cases, either the reply should be filed promptly or while taking the time to file reply, the leave may be sought from the Court so as to be free to pass final orders and in any case, the Court has to be at least informed that the final orders are likely to be passed before the next date on which the matter is to

come up for reply so that the Court can consider the question as to whether any interim order is required to be passed or not. In the opinion of this Court, the virtuous litigant like the State and its functionaries are not supposed to take such litigations as if they are adversary litigants and they have to respond to the notice issued by the Court as fairly as is expected of them so that the party which comes before the Court seeking protection against the threatened or apprehended injury is not left to believe that its efforts and quest for justice has been thwarted while it was already under the protection of the Court or that the Court has failed to protect it. Therefore, this Court holds that in this case, there has been a successful effort on the part of the respondents to overreach the process of the Court and the same has made the justice to be abortive in the petition which was pending before the Court.

6. While challenging the final order dated 25th May 1999 whereby the Municipality has been dissolved, it was submitted on behalf of the petitioners that the show cause notice dated 12th January 1999 issued in exercise of the powers under Sec.263(1) of the Gujarat Municipalities Act along with the allegations as levelled in Schedule appended thereto had been adequately replied on behalf of the Municipality and a copy of such reply has been placed on record at page nos.47 to 50 of the paper book, purporting to have been filed in May 1999. It has been submitted by learned Counsel for the petitioners that on behalf of the Municipality each and every allegation had been answered in the reply. However, the author of the impugned order dated 25th May 1999 has brushed aside these replies by making a bald reference to the same in the order and it will be evident from the contents of the impugned order dated 25th May 1999 itself that none of the allegations with regard to which adequate reply has been given on behalf of the Municipality has been considered objectively and the impugned order is in utter disregard of the scope of Sec.263 of the Municipalities Act. As against it, on behalf of the respondents, it has been submitted that the reply had been considered and whereas such reply had not been found to be satisfactory in face of the allegations, it cannot be said that it was not a case for exercise of powers under Sec.263(1) of the Municipalities Act.

7. Whereas no parawise reply to the petition has been filed on behalf of the respondents and the respondent no.1 has rest contended by filing the affidavit-in-reply dated 2nd July 1999 and in this affidavit-in-reply nothing has been said about the

queries which had been made by the Director as to how the dissolution was justified and only a bald reference is made in para 5 that the report was called from the Collector on 16th November 1998 and thereafter the show cause notice dated 12th January 1999 was issued, it does not meet the case as to how the queries made by the Director subsequent to 16th November 1998 i.e. on 29th December 1998 stood answered by this report which was sent by the Collector in the month of November 1998.

8. Section 263 of the Gujarat Municipalities Act is reproduced as under:

"263. (1) If, in the opinion of State Government a Municipality is not competent to perform, or deliberately makes default in the performance of the duties imposed on it by or under this Act, or otherwise by law or exceeds or abuses its powers, the State Government may, after giving the Municipality an opportunity to render an explanation, by an order published, with the reasons therefor, in the Official Gazette declare the municipality to be incompetent or in default, or to have exceeded or abused its powers, as the case may be, and may dissolve such municipality;

(2) When the municipality is so dissolved or superseded, the following consequences of dissolution consequences shall ensure:

(a) all councillors of the Municipality shall, in the case of dissolution as from the date specified in the order of dissolution, vacate their offices as such councillors;

(b) all powers and duties of the Municipality shall, during the period of dissolution, be exercised and performed by such officer as the [Director] from time to time appoints in this behalf;

(3) Constitution of Municipality after dissolution. - (a) An election to constitute a municipality shall be completed before the expiration of a period of six months from the date of its dissolution;

Provided that where the remainder of the period for which the dissolved municipality would have continued is less than six months, it shall not

be necessary to hold any election under this clause for constituting the municipality for such period.

(b) A municipality constituted upon the dissolution of municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved municipality would have continued had it not been so dissolved."

It is clear from the reading of the provisions as aforesaid that there must be (1) deliberate default in performance of the duties, and (2) exceeding or abusing powers while performing duties.

9. In cases where elected bodies forming the part of the local self Government as local authorities are to be dissolved, great care is required to be been taken so as to follow the relevant provisions as strictly as possible. In the instant case, the allegations as have been levelled in the show cause notice and on the basis of which the order has been passed do not indicate that there has been any deliberate default on the part of the concerned Municipality as such in the performance of its duties imposed on it by or under the Act or otherwise under law or that it is a case of exceeding or abusing its power as is clear from the contents of the letter dated 29.12.1998 sent by the Director of Municipalities to the Collector. The duties and powers of the Municipalities have been provided through various provisions under the Act and the allegations on which the impugned order is passed do not show that it was a case of deliberate default. For example, the allegation no.1 is virtually an allegation not against the Municipality as a body or its elected members but against the officers of the Municipality. It was purely a technical matter for which it cannot be said that the Municipality as a body or its elected members had deliberately defaulted, the reply against the allegation no.2 has been partly accepted by the author of the impugned order himself and no reason has been given for coming to the conclusion that the action was not taken by the elected members as such in accordance with the provisions of the Act. With regard to the allegations at item no.3, it is again found that it relates to the taking of the services of an experienced person for construction works instead of the Engineers holding the qualifications and that has been taken to be the violation of Sec.108 and 109. This Court does not find that there is any element of deliberate default in this allegation and as a matter of fact, the

order itself does not say so that even if such an action was taken, it was done deliberately. With regard to allegations at item nos.4 and 5, it may be straightway observed that they relate to the unauthorised encroachments and certain unauthorised construction which have been raised by some bodies and there are allegations with regard to not collecting the past revenues and here also, nothing has been alleged that for the reasons extraneous or otherwise, the Municipality had deliberately defaulted. With regard to allegations at the items nos.6 and 7, apart from the fact that it has not been alleged that these defaults were deliberate, the author of the impugned order has not even sifted the detailed reply which had been given by the Municipality in its reply to the show cause notice and the allegation no.7 is with regard to uncleanliness in the Municipal areas and that there was no regular cleaning. This Court is of the considered opinion that if such allegations as have been levelled against the Municipality in the present case are sought to be made the basis for dissolving the Municipalities, hardly any Municipality may be spared from being dissolved under Sec.263. For the purpose of dissolution of an elected body unless there are defaults of grave nature and that too with the element of deliberate default as contemplated in Sec.263 itself, there is no question of dissolving such a body. The encroachments or various unauthorised constructions have become routine matters even on the Government lands these days and despite all efforts some time practical difficulties are faced in the matter of removing unauthorised encroachments and unauthorised constructions. Even the mighty State with all the machinery to maintain the law and order is not able to remove certain unauthorised encroachments or certain unauthorised constructions at times more than one because of agitations, protests by groups of people with or without political support and practical difficulties in demolishing such unauthorised constructions or for removing unauthorised encroachments. Similar cases may be there for the purpose of recoveries of the past revenue. With regard to items of un-cleanliness in the Municipal areas, it has to be considered that in a given case even with all the bonafide efforts in this regard, it may not be possible to achieve the object for reasons more than one, including the lack of civil sense of the people living in the area and the want of proper training to maintain cleanliness amongst the residents of such areas and there may be more than one limitations for the State and concerned local authorities for such purposes including the financial position, the availability of resources, the manpower and the labour required for that

purpose etc. available at the disposal of the State and such bodies. Therefore, the care has to be taken that the elected bodies whether they are Municipalities or Panchayats or any other bodies of this nature which are elected bodies are not dissolved and subjected to the administration of the officers of the Government for trifles. No elected body can be dissolved which are of consequence for reasons which are not at all compatible with the relevant provisions and such provisions have to be adhered to as strictly as possible and each and every word used in the provisions under the Act by the legislature has to be given a meaning. No doubt, the Government possesses the power to dissolve the Municipality and appoint the Administrator therein but such power cannot be exercised in arbitrary manner. An action may be declared to be illegal if the action has been taken in absence of any power and even if an action is taken for which the power is vested in the Government or the particular authority, the action is yet vulnerable to be struck down if the power has been exercised arbitrarily. In the facts of this case, this Court finds that the power under Sec.263(1) has been exercised against the Municipality de-hors the scope of Sec.263 and in wholly arbitrary manner. As a matter of fact, on the allegations of this nature, the elected body like the Municipality should not have been subjected to the initiation of action under Sec.263 and in the facts of this case, the very foundation so as to constitute a bedrock for a case under Sec.263(1) of the Municipalities Act was wanting and this Court finds that the author of the impugned order has failed to apply his mind objectively to the questions which were raised on behalf of the Municipality in the reply to the show cause notice and the same has resulted in unlawful dissolution of the Municipality and the consequential appointment of the Administrator. Learned Counsel for the petitioners has placed reliance on a decision of this Court in the case of SAVITABEN MADHUKAR MAKIWANA AND ORS. vs. STATE OF GUJARAT AND ORS. reported in 1998(1) GLR 321. In this case, the Court found that the principles of natural justice had been violated and had clearly observed that for forming an opinion that a Municipality is not competent to perform its duties imposed on it by or under the Act, it is incumbent upon the State Government to examine the facts and circumstances which are put forth as a defence by the Municipality for explaining its conduct. The expression "Municipality is not competent to perform or deliberately fails to perform duties imposed on it under the Act" would show that an isolated fault or inaction is hardly sufficient to attract these provisions and that the general performance of the

Municipality is required to be viewed in the light of the explanation that it may have given and the opinion can be formed only after considering all the relevant aspects having bearing on the non-performance or inaction or deliberate defaults or abuse of power, as the case may be. The Court has further observed that consequences of dissolution are drastic and therefore, before putting an end to the tenure constitutionally guaranteed, it becomes absolutely necessary for the State Government to strictly observe the principles of natural justice. The observations as aforesaid in this decision aptly apply to the facts of the present case and this Court finds that even if the impugned order is not to be set aside only on the ground of the action having been taken by the State Government so as to overreach the process of the Court, yet, the impugned order as it is, cannot be sustained on the merits of the case itself.

10. The upshot of the aforesaid adjudication is that the Special Civil Application No.4065 of 1999 succeeds, the impugned order dated 25th May 1999 passed against the petitioners, i.e. Surendranagar Dudhrej Nagar Palika under the signatures of the Deputy Secretary of Urban Development and Urban Housing Department of the State of Gujarat, is hereby quashed and set aside in toto and as a result thereof, the Surendranagar Dudhrej Nagar Palika stands relegated to the position where it was before the passing of the impugned order dated 25th May 1999 and the status of all the Councillors of the said Municipality including that of the President and the Vice President stands restored as if the impugned order dated 25th May 1999 had never been passed against the said Municipality and the Administrator appointed by the Government under the said order dated 25th May 1999 shall forthwith cease to function as the Administrator of this Municipality.

11. This Special Civil Application No.4065 of 1999 is allowed in the terms as aforesaid and the Rule is made absolute accordingly. The Special Civil Application No.586 of 1999 is dismissed as having become infructuous and the Rule is discharged therein. No order as to costs.

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